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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ANTHONY FRANCIS EBERT, ET UX.,
Petitioners,

v.

JUDITH P. RITCHEY, ETC., ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OBJECTION TO JURISDICTION

Petitioners have blatantly disregarded the provisions of Rule 21.1(h) of this court, in their Petition for Certiorari, by failing to specifically delineate precise references to the record showing that a federal question was timely and properly raised and decided by the Maryland Courts. Undoubtedly, the reason for this omission is because Petitioners did not raise any federal, constitutional issues in the trial court (Circuit Court for Baltimore County), the intermediate appellate court of Maryland (Court of Special Appeals), or in Maryland's highest court (Court of Appeals).

Petitioners' own exhibits and references to the record demonstrate clearly that no federal, constitutional question or issue was either raised or decided in any of the three Maryland Courts which considered this case.

In the trial court, Petitioners acquiesced to the ruling of the trial judge, on the

issue of the propriety of the Maryland Dead Man's Rule, agreeing it would "apply" to certain testimony of the petitioner, Anthony F. Ebert (See Petition for Writ of Certiorari, pp 3-4). Furthermore, after the trial judge sustained objection to the question, Petitioners did not present any federal, constitutional issue to the trial judge or in any other manner raise or preserve such an issue. The opinion of the trial court (Petitioner's Appendix, pp 1-7) makes no mention of any federal, constitutional issue raised or decided at the trial of the case.

Petitioners' appeal to the Maryland Court of Special Appeals raised five issues (see Petitioners' Appendix, p. 10) - none of which presented a federal, constitutional question.

When Petitioners finally constructed their novel theory, that the Maryland Dead Man's Rule is "unconstitutional", they still did not make any mention of any federal, con-

stitutional provision which would render the Maryland statute infirm. Although Petitioners asserted a "constitutional" theory before the Maryland Court of Appeals, it was unclear whether the reference was to the Federal Constitution or the due process provision of the Maryland Constitution (Declaration of Rights-Article 24). Such defects in the record preclude the exercise of jurisdiction by this Court. In the case of Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889 (1981), Justice White stated for the court:

For all of these reasons, we, as well as litigants seeking to bring cases here from the state courts, should take care to comply with the jurisdictional statute and our rules. Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the federal constitution or the federal statute on which they rely, we have not insisted on such inflexible specificity. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here.

At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

* * *

Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without jurisdiction in this case. Accordingly, the writ is dismissed for want of jurisdiction. (emphasis added)

Respondents submit that the jurisdictional principles articulated by this Court in Webb v. Webb, supra, are controlling in this case. That is, where the record does not clearly reflect that a federal question has been raised and decided in the state court below, the appellate jurisdiction of the Supreme Court fails. Accord, Illinois v. Gates, U.S. , 103 S.Ct. 2317 (1983); Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct.

1163 (1969); Tacon v. Arizona, 410 U.S. 351, 93 S.Ct. 998 (1973); City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 672, 96 S.Ct. 2358 (1976).

In addition to noncompliance with federal law, as set forth above, there is an independent state procedural ground barring consideration of the constitutional issues raised by petitioners. Under Maryland law, the failure to present a point or question to the trial court precludes consideration by the Maryland Court of Special Appeals, Maryland Rules of Procedure, Rule 1085, or by the Maryland Court of Appeals, Maryland Rules of Procedure, Rule 885. The Maryland appellate courts have stated that the requirements of these two rules are matters of "basic fairness to the trial court, and to opposing counsel, as well as being fundamental to the proper administration of justice." Medley v. State, 52 Md. App. 224, 448 A.2d 363 (1982). Furthermore, both of these

rules have been construed to prevent a belated attack in the appellate courts on the constitutionality of a Maryland statute.

Woodell v. State, 2 Md. App. 433, 234 A.2d 890 (1967); Smith v. State, 16 Md. App. 317, 295 A.2d 802 (1972); Hall v. State, 22 Md. App. 240, 323 A.2d 435 (1974).

The record in this case shows that Maryland's highest court refused to consider Petitioners' "constitutional" issues. This court has frequently stated that when the "highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this court can affirmatively show the contrary" Webb v. Webb, supra; Michigan v. Tyler, 436 U.S. 513, 98 S. Ct. 1942 (1978); Street v. New York, 394 U. S. 576, 89 S.Ct. 1354 (1969).

Respondents submit that it is totally unfair for Petitioners to raise federal,

constitutional questions some two and one-half years after the trial of this case. The issues presented to this court appear to be an "after-thought" of Petitioners' counsel.

STATEMENT OF THE CASE

Although Petitioners' version of the facts is reasonably accurate, Respondents would point out that a more precise statement is articulated in the opinion of the Maryland Court of Special Appeals (Petitioners Appendix pp 8-10). This court is also asked to note that the trial judge carefully conducted a three day trial, heard from six witnesses (including Petitioner, Anthony F. Ebert) and received thirty-two separate exhibits into evidence. The testimony from the disinterested witness showed that the intent of the decedent, Charles F. Ebert, was for his assets to be divided equally among his heirs. Furthermore, the record in this case is replete with admissions against

interest made by Petitioner, Anthony F. Ebert, which are more than sufficient to prove the decedent's intent to divide his assets equally among his surviving brothers and sister and the Petitioner's awareness of his obligation to do so.

ARGUMENT

Apart from the jurisdictional objections set forth above, Respondents wish to alert the court to several additional reasons why a grant of certiorari would be inappropriate in this case.

Petitioners loudly complain that the Maryland Dead Man's Rule prevented their testimony before the trial court regarding certain bank accounts. Respondents submit that the record shows not only that petitioners failed to properly preserve appellate review on this point, regarding the testimony of Anthony F. Ebert, but also that co-petitioner, Adeline Ebert, never took the witness stand and was never asked a single question!

Respondents contend that it is an inexcusable attempt to mislead this court to state that "Petitioners were unable to testify" (Petition for Certiorari, p. 12) when only one of the Petitioners was offered as a witness at trial.

Maryland law is clear that where an objection to testimony is sustained, and evidence is excluded, by the trial court, such ruling may be preserved for appellate review only by stating to the trial court a detailed summary of what the testimony would have been had the witness been permitted to answer the question. Hughes v. Averza, 223 Md. 12, 161 A.2d 671 (1960); Hooton v. Kenneth B. Mumaw Plumbing and Heating Co., 271 Md. 565, 318 A.2d 514 (1974). In the absence of a proffer in the trial court, as to what the evidence would be, there is "nothing to review on appeal". Kennedy v. State, 289 Md. 54, 421 A.2d 1376 (1980). See also Chevrolet Motor Co. v. Gladding, 42 F2d 440 (1930,

CA4), cert. denied 282 U.S. 872, 51 S.Ct. 78.

In this case, the record is devoid of any proffer as to what the testimony of Anthony F. Ebert would have been, had the trial court allowed the Petitioner to answer the question objected to (See Petition for Certiorari, p. 3). Accordingly, this court would be required to speculate and conjecture on what the Petitioner's answer would have been and such procedure would certainly be a precarious practice.

Even if the court elected to engage in speculation, as to Petitioner's answer, it is submitted that even a favorable response would be merely cumulative of other evidence submitted by Petitioners at trial (e.g. paper writing of decedent, Petition for Certiorari, p. 9) [Petitioners persist in characterizing this document as a "will" despite the trial judge's ruling that it was not a will and was not reflective of decedent's true intentions at his death - see Petition-

er's Appendix A-5].

Respondents also submit that Petitioners' arguments on the issues submitted to this court are without any citation of authority which would support their reasoning or conclusions. Respondents' counsel could not locate even one case or precedent which would support Petitioners' assertion that a reasonable restriction on the receipt of evidence against decedent's estates is "unconstitutional". In this regard, the court is asked to note that all of the Respondents in this case were precluded from testifying, under the Maryland Dead Man's Rule, in the same manner as were Petitioners. See Reddy v. Mody, 39 Md. App. 675, 338 A.2d 555, cert. denied, 238 Md. 736 (1978). Under Maryland law, claims against, or in favor of, decedent's estates must come from disinterested witnesses.

In all candor with the court, Respondents believe that the petition filed in this

case is so utterly without merit as to warrant an award of damages in favor of the Respondents. Not only was there a complete failure to properly preserve any federal, constitutional question in the state courts, Petitioners' counsel has continued his practice of failing to adequately research the applicable law necessary to sustain jurisdiction on appeal. Such neglect on the part of Petitioners' counsel creates an incredible amount of work and expense for this Court, to counsel and to the Respondents who are persons of modest means. Furthermore, the Petitioners have been greedy and uncompromising in their refusal to turn over the decedent's funds to decedent's personal representative, notwithstanding the clear mandate of the Maryland Courts to do so. The court is respectfully urged to consider Respondents' Motion for Damages, filed contemporaneously with this Brief, and thereafter to assess a realistic award of damages against

the Petitioners in this case.

CONCLUSION

Petitioners have failed to properly preserve appellate review in this Court by not raising any federal, constitutional issue in the state courts. Even without this defect in the record, this Court would be required to speculate on Petitioners' contentions because no proffer of evidence was made to the trial judge. In all events, the decisions of the state courts below followed a long line of Maryland precedents, were based on substantial evidence and reached a fair and just result. Accordingly, no further review of this case is warranted.

Respectfully submitted,

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APPENDIX

Maryland Rules of Procedure-Rule 1085

Scope of Review--Limited to Questions Decided by Lower Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court; but where a point or question of law was presented to the lower court and a decision of such point or question of law by this Court is necessary or desirable for the guidance of the lower court or to avoid the expense and delay of another appeal to this Court, such point or question of law may be decided by this Court even though not decided by the lower court. Where jurisdiction cannot be conferred on the Court by waiver or consent of the parties, a question as to the jurisdiction of the lower court may be raised and decided in this Court whether or not raised and decided in the lower court.

Maryland Rules of Procedure-Rule 885

Scope of Review--Limited to Questions Decided by Circuit Court.

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court; but when a point or question of law had been presented to the court and a decision of that point or question of law by this Court is necessary or desirable for the guidance of the circuit court, or to avoid the expense and delay of another appeal to this Court, the point or question of law may be decided by this Court even though it was not decided by the circuit court. When jurisdiction cannot be conferred

red on this Court by waiver or consent of the parties, a question as to the jurisdiction of the circuit court may be raised and decided in this Court, whether or not raised and decided in the circuit court.

Constitution Of Maryland

Declaration of Rights--Article 24. Due Process.

That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.